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IN THE

Supreme Court of the United States

U.S. SUPREME COURT, U. S.
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CHARLES ELWOOD COMPTON
CLERK

October Term, 1942.

No. **421**

JOHN J. FULTON COMPANY, a corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT AND
BRIEF IN SUPPORT THEREOF.

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**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.**

To the Honorable Supreme Court of the United States:

The petition of John J. Fulton Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above cause on July 21st, 1942, affirming a decision of the Federal Trade Commission.

Opinions Below.

The order to cease and desist [R. 53, 65] is reported in 33, F. T. C. Dec. 218. The opinion of the Circuit Court of Appeals [R. 381] is reported in Fed. (2d)

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Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 21st, 1942. The jurisdiction of this Court is invoked under Section 240-a of the Judicial Code, as amended by the Act of February 13, 1925. (28 U. S. C. A., Section 347.)

Reference is made, also, to Rule No. 38-5(b) of the Supreme Court, wherein is specified some of the reasons which will be considered by the Supreme Court in the exercise of its sound judicial discretion with respect to the issuance of writs of certiorari.

Statute Involved.

Sections 5 (a) and 12 (a) of the Federal Trade Commission Act (15 U. S. C. A. 45, 52).

Statement of Matter Involved.

The action below is in review of a cease and desist order of the Federal Trade Commission against petitioner, a South Dakota Corporation, with its place of business at 88 First Street, San Francisco, California.

The statement in the Circuit Court opinion is so concise, and at the same time states the Commission's case against petitioner so fully, that it is respectfully quoted [R. 381], as follows:

THE COMPLAINT.

"In a proceeding before the Federal Trade Commission, here under review, petitioner was ordered to desist from advertising its product, Uvursin, as an effective treatment for diabetes.

"Petitioner advertised the preparation in medical journals and in circulars distributed to the profession.

Typical representations determined by the Commission to be false were that Uvursin 'is a mild and innocuous oral treatment for diabetes mellitus'; that it is an efficacious treatment; that diabetic gangrene 'yields to Uvursin'; and that the product 'is being recognized as the preferred treatment in diabetes mellitus.' In conjunction with the drug a rigid diet was recommended."

DIABETES.

"Diabetes results from a decrease in the internal secretion of the pancreas manifesting itself by an abnormal elevation of the blood sugar and also by the appearance of sugar in the urine."

INSULIN TREATMENT.

APPROVED WITH DIET.

"The modern and accepted way of controlling the disease is by diet and the hypodermic injection of insulin adjusted to meet the needs of each patient."

UVURSIN TREATMENT.

ATTRIBUTED TO DIET ONLY.

"The Commission found that petitioner's preparation is largely a compound of herbs long enjoying a reputation, particularly in folklore medicine, for the treatment of urinary conditions. Some of the herbs were anciently prescribed for use in the form of tea for the alleviation of bladder and kidney diseases. In diabetic cases the effect of these drugs is illusory. By increasing the flow of the urine they dilute its sugar content, while the actual condition of the patient remains as before. Uvursin, without diet, was found to be devoid of therapeutic value in the treatment of the malady."

COMMISSION'S WITNESSES ACCEPTED ON GENERAL KNOWLEDGE ONLY.

"The findings have support in the testimony of expert witnesses called by the Commission. But the petitioner argues that since none of the experts had prescribed Uvursin or observed its effects in concrete cases their testimony was incompetent and inadmissible. We think otherwise. The witnesses were shown to possess wide knowledge in the field under inquiry. There is no good reason to suppose them incompetent to express an opinion as to the lack of therapeutic value of petitioner's preparation merely because they had had no personal experience with it in the treatment of the disease. Their general medical and pharmacological knowledge qualified them to testify. *Justin Haynes & Co. v. Federal Trade Commission*, 2 Cir., 105 F. 2d 988, 989, cert. den., 308 U. S. 616; *Neff v. Federal Trade Commission*, 4 Cir., 117 F. 2d 495, 496-497; *Goodwin v. United States*, 6 Cir., 2 F. 2d 200, 201; *Dr. W. B. Caldwell Inc. v. Federal Trade Commission*, 7 Cir., 111 F. 2d 889, 891."

PETITIONER'S WITNESSES DISREGARDED.

"Several medical witnesses called by petitioner testified to the efficacy of Uvursin in particular cases in their own practice; but since none of them was shown to have administered the drug under proper scientific controls, the Commission was of the belief that their evidence had little probative value as compared to expert testimony based on general knowledge."

ASSUMPTIONS AGAINST PETITIONER AND UVURSIN.

"It was thought—and there is much evidence to justify the finding—that in diabetic cases there may be spontaneous or temporary remissions, depending in

part on the character of the diet. The Commission was clearly entitled to accept the testimony of experts in the general field. *Justin Haynes & Co. v. Federal Trade Commission*, *supra*; *cf. Alberty v. Federal Trade Commission*, 9 Cir., 118 F. 2d 669, 670, cert. den., 314 U. S. 630."

COMMISSIONER'S WITNESS WANTED CLINICAL TEST.

"Prior to the hearing a witness for the Commission had obtained Uvursin in the thought of making a controlled test on diabetic patient in the Los Angeles County Hospital, but after consultation with a colleague he abandoned the idea because of his fear that the preparation might contain synthalin, which is a liver poison; and the witness was reluctant to expose his patients to the risk. The witness testified that some oral patent nostrums for the control of diabetes have contained the substance, although it was not mentioned in the advertising matter, and that it is very difficult to show the presence of synthalin by chemical methods. Petitioner intimates that the decision adverse to the making of the experiment was in some way induced or inspired by the Commission, but there is nothing whatever in the record to support the argument. It goes without saying that the petitioner was itself at liberty to have clinical tests of this character conducted and to present the results to the Commission if it saw fit."

INSULIN MONOPOLY.

"It is urged that the Commission's order tends to promote monopoly and is against the public interest; and that 'medicine which can bring bona fide relief to the afflicted' ought to be encouraged rather than the reverse. But a study of the record dissipates any feeling of apprehension that the public will suffer injury from the action taken here."

DANGER IN INSULIN MONOPOLY.

The Department of Commerce, Bureau of the Census, has recently issued a special vital statistics report, dated August 4, 1942, which gives a mortality summary, for U. S. Registration States, on diabetes mellitus. This report is hereto attached, in the appendix.

Table A shows that deaths from diabetes mellitus increased between 1923, when Insulin came into general use [R. 107], and 1940 from 17,153 to 35,015, and that the death rate for 100,000 estimated population increased between these years from 17.7 to 26.6.

Qualification of Commission's Witnesses?

The findings of the Commission, adopted by the Court, state the qualification of the Commission witnesses:

"On the subject of the therapeutic value of respondent's preparation Uvursin three expert witnesses were called at the instance of the Commission. Two of these witnesses," Doctors Leake and Thienes, "were Professors of Pharmacology in outstanding medical schools and had devoted much study to the subject of diabetes. The third witness," Dr. Modern, "was a practicing physician many years' experience specializing in diabetes and who was at the time of the hearing, in charge of one of the diabetic services at the Los Angeles County General Hospital," [R. 58.]

Lack of Knowledge of Drs. Leake and Thienes.

Dr. Leake never used Uvursin in the treatment of a patient [R. 240], and never personally saw a patient in the course of treatments with Uvursin. [R. 241.] In his general experiments and studies with some of the constituents of Uvursin, he never had diabetes in mind:

“Except I think there was a consideration of the use of dandelion in diabetes as a part of some—it is rather vague in my mind at the time—some folklore notion in that respect and I think we have also investigated the action of methyl salicylate on sugar metabolism, although again I can’t answer you directly. My memory is hazy on those points.” [R. 243-4.]

Dr. Thienes never heard of Uvursin except in connection with this hearing [R. 137], had never used it, nor seen it used. [R. 145.]

Dr. Modern Wanted Clinical Test.

Dr. Modern, the third witness, and physician in the diabetic service at the Los Angeles General Hospital, never used Uvursin [R. 96], but wanted to give it a clinical test:

“I want to be perfectly fair in this thing. I obtained a supply from the J. J. Fulton Company of Uversin. I was all set to go ahead on my service in the County Hospital, to go ahead under controlled conditions using this product, that is, put the patient first on a diet, then give him Uversin; then take Uversin away. In other words, see how the thing acts in the same patient. * * *” [R. 110.]

Dr. Modern wrote the Commission Agent in charge of this case:

"* * * Shortly after your visit here, I had the Fulton Company send me a sample of Uversin, which I intended to use on my Diabetic Service at the County Hospital. Before doing so, however, I conferred with Doctor Thienes (one of the other 'experts'), who told me that many of these preparations contain synthalin, which is a guanidine derivative and is very difficult to demonstrate by chemical methods. Synthalin is a liver poison, so I did not wish to expose my patients to that potential danger. * * * I am sorry that I could not make my clinical trial as I intended to do." [R. 113.]

The ingredients of Uvursin were determined by the Commission. They do not include synthalin. [R. 59.]

Trial Examiner's Report on Dr. Cowles' Qualifications and Testimony.

"Dr. D. C. Cowles of Fullerton, California, was called as a witness by the respondent and stated that he graduated from the University of Minnesota in 1901. After graduating from the University of Minnesota, for 15 years he practiced in the City of Minneapolis, Minnesota, and then came to California, where he has been actively engaged in the practice of medicine since that time, and at the present time he considers himself an 'all round' doctor of medicine surgery. At the present time he is a member and past president of the County Medical Society, a member of the Southern California Medical Society, the

Surgical Southern Medical Society, and the California Medical Society, and the American Medical Association." [R. 28.]

"Witness testified he had foreign affiliations, having done post-graduate work in Hotel Du Diu, Paris, and Guys' Hospital in London, and at Berlin in the Frauen Clinic, and the Allgemine Kranken Haus in Wien, and the All States Hospital in Rome." [R. 28.]

"He has had a number of cases of diabetes such as usually come to a country practitioner. His first treatment for such cases has always been Insulin, but later on he has changed them to Uvursin, because it was more convenient, more satisfactory and cheaper." [R. 28.]

"Witness related a case in which it was necessary to amputate both of a diabetic patient's lower limbs, and trouble was experienced in getting them to heal properly. After giving the patient Insulin for some time, without any effect, the witness changed to Uvursin and in five days' time a remarkable recovery was noticed." [R. 28-29.]

"In another case, the patient was a man 81 years of age afflicted with chronic diabetes combined with cancer of the pancreas. The witness testified that in this case the only treatment given was a diet and Uvursin." [R. 29.]

"Witness also related another case in which the patient was 52 years of age and had chronic diabetes. He was first called to treat him in 1934 and the man

is alive and well today. He still comes in once in every two weeks for a checkup. The only treatment given this patient was Uvursin." [R. 29.]

"The witness testified that it was his opinion that Uvursin has a therapeutic value and that he intends to continue its use in treating diabetes, because he has found it a mild treatment and it has proved very successful in his treatments." [R. 29.]

"He has had good results in using Uvursin in the treatment of gangrene. He testified that there are certain cases of diabetes which the use of diet alone will control and it is not necessary to give Uvursin in these cases; although it was his experience that by the administration of Uvursin with the diet better results follow. The witness testified that diabetes is incurable but he has been quite successful in treating it with Uvursin." [R. 29.]

A more complete statement of the testimony of Dr. Cowles is contained in petitioner's exceptions to the report of the Trial Examiner [R. 42-51] and given in part in the Appendix hereof.

The Questions Involved.

The issues involved are:

1. Are the findings against Uvursin true?
2. Did the Court err in the application of *Justin Haynes & Co. v. Federal Trade Commission*, and kindred cases, (1) in qualifying the Commission witnesses and their testimony, and (2) in disregarding proof from the practice and experience of an eminently qualified physician?
3. Was it against public policy for the Commission not to permit its own witness, in search of knowledge, to qualify by making the clinical test he had set up and desired in a great hospital, and for the Circuit Court not to order and direct said test as prayed by petitioner?
4. Is the Cease and Desist Order of the Commission, and its affirmance by the Circuit Court, conducive to monopoly, and against public policy in view of the increasing mortality rate of diabetes?
5. Should the order and its affirmance be reversed upon the competent proof before the Court?

Reasons Relied on for the Allowance of the Writ.

1. The decision of the Circuit Court of Appeals herein is in conflict in principle with decisions of other Circuit Courts of Appeal.

2. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

3. The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial procedure, or so far sanctioned such a departure by the Federal Trade Commission, as to call for an exercise of this Court's power of supervision.

ZACH LAMAR COBB,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for the petitioner in the above-entitled cause and that, in my judgment, the foregoing petition is well founded in law and fact, and that the said petition is not interposed for delay.

Dated this 24th day of September, 1942.

ZACH LAMAR COBB,
Counsel for Petitioner.





IN THE
Supreme Court of the United States

October Term 1942

No.

JOHN J. FULTON COMPANY, a corporation,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

BRIEF IN SUPPORT OF PETITION.

1. IT IS AGAINST PUBLIC POLICY TO FOSTER AN INSULIN MONOPOLY—WHEN GOVERNMENT RECORDS SHOW THAT THE DIABETES MORTALITY RATE IS INCREASING MORE RAPIDLY SINCE INSULIN WAS INTRODUCED, IN 1923, THAN BEFORE.

The Census Bureau of the Department of Commerce has recently issued its Vital Statistics Special Report, dated August 4, 1942, on the mortality rate of diabetes mellitus, which is attached hereto in the Appendix. The Court may take judicial notice of this Government Report.

Insulin came into general use by physicians, as an accepted treatment for diabetes, in about 1923 [R. 107].

Table A of the Census Report, therefore, is quoted for the three years, 1900, 1923 and 1940, as follows:

Year	Deaths from diabetes Mellitus	Rate per 100,000 estimated population
1940	35,015	26.6
1923	17,153	17.7
1900	2,187	11.0

Upon this issue of monopoly:

1. The Commission found that "there is no accepted treatment for diabetes other than diet and insulin adjusted properly to meet the needs of each patient" [R. 59]; and
2. Petitioner's statement of the points to be relied upon in the Circuit Court complained that the Order of the Commission was "conducive to monopoly" [R. 375].

The Circuit Court opinion states: "it is urged that the Commission's order tends to promote monopoly * * * But a study of the record dissipates any feeling of apprehension that the public will suffer injury from the action taken here." (*supra* 5.) The Government Report had not then been issued and was not before the Court.

It is respectfully submitted that the public interest is of first importance in this case, and that no order should stand that bars any bona fide, meritorious treatment of diabetes.

Capon Water Company v. Federal Trade Commission, 107 Fed. (2d) 516, at 517:

"If, on the other hand, they (mineral waters) do possess separate curative properties, their use and so their advertising should be encouraged."

2. IT WAS AGAINST PUBLIC POLICY FOR THE COMMISSION NOT TO PERMIT DR. MODERN, ITS OWN WITNESS, TO MAKE THE CLINICAL TEST OF UVURSIN HE SET UP AND WANTED TO MAKE; AND FOR THE CIRCUIT COURT NOT TO ORDER SAID TEST AS PRAYED BY PETITIONER.

Dr. Modern is a physician and surgeon. He is a graduate of the German University of Prague. He has been a resident of this country since 1923, when Insulin came into use. In 1923, he was associated with Dr. Allen, head of the physicians at Rockefeller Institute, in the "department devoted to research and study of diabetes and kidney disease" [R. 87-8]. Please note that diabetes and kidney diseases were so classified together.

Since 1931, Dr. Modern has been an attending physician, and in charge of one of the four diabetic services, at the Los Angeles County General Hospital [R. 88]. With his experience and training, as a practical physician and research student, it was natural that he wanted to give Uversin a clinical test at the General Hospital. He testified:

"I want to be perfectly fair in this thing. I obtained a supply from the J. J. Fulton Company of Uversin. I was all set to go ahead on my service in the County Hospital, to go ahead under controlled conditions using this product, that is, put the patient first on a diet, then give him Uversin; then take Uversin away. In other words, see how the thing acts in the same patient. * * *" [R. 110; *supra* 7.]

He later wrote the Commission Agent engaged in preparing this case against petitioner how Dr. Thienes, another Commission witness, had persuaded him not to go

on with the test, and that "I am sorry that I could not make my clinical trial as I intended to do." His letter stated:

"* * * Shortly after your visit here, I had the Fulton Company send me a sample of Uversin, which I intended to use on my Diabetic Service at the County Hospital. Before doing so, however, I conferred with Doctor Thienes (one of the other 'experts'), who told me that many of these preparations contain synthalin, which is a guanidine derivative and is very difficult to demonstrate by chemical methods. Synthalin is a liver poison, so I did not wish to expose my patients to that potential danger. * * * I am sorry that I could not make my clinical trial as I intended to do." [R. 113; *supra* 8.]

The record shows that Uvursin does not contain synthalin [R. 59]. Therefore, the test was prevented on unfounded suspicion. The subsequent order was based on a different ground, that "The use of this preparation may be definitely harmful to a patient suffering from diabetes mellitus, in that it would give a false sense of security and delay the inauguration of effective treatment." [R. 62.]

The Commission's agent in charge proceeded with the case, and the Commission acted, without the benefit of this test. The Commission found:

"That plant materials listed in respondent's preparation have enjoyed a very long reputation, particularly in folklore medicine, for the treatment of urinary conditions, and some of these plant materials were formerly used in the form of tea for bladder and kidney diseases." [R. 60]

Because of its symptoms, both in the disease and in its response to treatment, diabetes was classified with bladder and kidney diseases as late as 1923 [R. 88].

The clinical test proposed by Dr. Modern would have determined the truth about Uvursin. In the Circuit Court petitioner consented to the test, urged why it should be made, and prayed that it be authorized and directed by the Court, provided only that petitioner be represented by a competent and acceptable physician in association with Dr. Modern.

In a brief before the Circuit Court Petitioner stated:

"Petitioner now consents to the clinical test proposed and set up by Dr. Modern, the Commission's witness, provided only that petitioner is represented by a competent and acceptable physician in association with Dr. Modern, in the conduct of the tests."

and submitted:

"1. That the merits of Uvursin, and the truth or falsity of petitioner's advertisements, published exclusively in Medical Journals, and in circulars sent exclusively to accredited physicians, could be determined by the clinical test, proposed by Dr. Modern, the Commission's witness, and consented to by petitioner, as aforesaid."

"2. That said test should be in the Los Angeles County General Hospital, as proposed, and should be conducted by Dr. Modern and a competent and acceptable physician to be named by petitioner;"

and prayed:

"1. That said clinical test be authorized and directed as aforesaid;"

Petitioner cited *Capon Water Company v. Federal Trade Commission* (*supra*).

The Circuit Court made the following statement on this issue:

"* * * Petitioner intimates that the decision adverse to the making of the experiment was in some way induced or inspired by the Commission, but there is nothing whatever in the record to support the argument." [R. 384; *supra* 5.]

Petitioner means no offense to the Commission, but respectfully insists upon the facts shown by the Commission's own witness, Dr. Modern, in his said testimony and letter, and respectfully insists that the Commission, through its agent in charge, proceeded against petitioner, and later condemned Uvursin, without permitting the test set up and desired by its own witness.

The Circuit Court then disposed of the issue as follows:

"It goes without saying that the petitioner was itself at liberty to have clinical tests of this character conducted and to present the results to the Commission if it saw fit." [R. 384; *supra* 5.]

The following is submitted to show that petitioner did furnish proof of such a clinical test:

Dr. Modern stated the requirements of a clinical test. (*Supra* 7.) In Dr. Cowles' practice, tests were always made to see the progress by checking the general feeling of the patient, the blood sugar content, and the sugar in the urine. He did this in all of the cases mentioned. All

of his testimony is based on blood tests as well as urine tests. (*Infra* 28-9.)

Dr. Cowles always tried Insulin first, but used Uvursin where Insulin failed. (*Supra* 9.)

In one case, where gangrene had set in and he had to amputate both legs of a patient 76 years old, he found that the stumps would not heal and the sutures would not hold. After Insulin failed, he tried Uvursin. The sugar decreased, the sutures held, the stumps healed, and the patient lived until he died from pneumonia four years later. (*Supra* 9; *Infra* 25-6, 28.)

In another case, an 81 year old patient, with chronic diabetes, no Insulin was used because the patient would not take a hypodermic. He was treated with Uvursin and diet, and lived for four years. (*Supra* 9; *Infra* 26-7.)

In another case, a patient 52 years old, with chronic diabetes, was treated with Uvursin only, in 1934. He is still working hard in the oil fields as a roustabout. This patient had previously taken Insulin, but had had trouble. He has not taken any Insulin since he started Uvursin in 1934. (*Supra* 9-10; *Infra* 27, 29-30.)

A woman patient, 52 years old, broke a needle in her shoulder muscle and refused to take any more Insulin. She was given Uvursin in 1934, and has never used Insulin since. She is still "going strong". (*Infra* 27-8.)

It is submitted, therefore, that the failure of the Commission to permit Dr. Modern to make his test, and the Court's failure to order it, was against public policy.

3. THE DEATH SENTENCE CEASE AND DESIST ORDER IS BASED UPON A MISAPPLICATION OF THE HAYNES CASE, BOTH IN QUALIFYING THE COMMISSION'S INCOMPETENT WITNESSES AND IN BLACKING OUT PETITIONER'S PROOF.

The Commission's Cease and Desist Order is nominally against petitioner's advertising matter. It is actually a death sentence of both petitioner and Uvursin. Any feature of the advertising justly found objectionable could be corrected without the death sentence.

The *Haynes*, *Neff*, *Goodwin* and *Caldwell* cases were cited by the Court to qualify the testimony of the Commission witnesses, none of whom had any experience with or practical knowledge of Uvursin. (*Supra* 4.) The *Haynes* and *Alberty* cases were cited by the Court on the proposition that the testimony of petitioner's witnesses, based upon actual experience, "had little probative value as compared to expert testimony based on general knowledge." (*Supra* 4-5.)

This erroneous application of the *Haynes* case was made by the Court although the Commission's best witness, in search of qualifying knowledge, had set up a clinical test at the great Los Angeles County General Hospital, where he was in charge of a Diabetic Service, had wanted to make the test, and had so informed the Commission's agent in charge of the case, and although petitioner consented and prayed that the Court order and direct that the test be made. (*Supra* 15-6, 17-8.)

The findings of the Circuit Court upon which it affirmed the Cease and Desist Order of the Commission were

contrary to the actual experience of the eminently qualified Dr. Cowles (*Supra* 8-9), as follows:

1. The Court found that "In diabetic cases the effect of these drugs (ingredients of Uvursin) is illusory." (*Supra* 3.) Dr. Cowles used Uvursin in the treatment of a patient with gangrene in both legs, where the legs had to be amputated, where Insulin failed, and where Uvursin succeeded. (*Supra* 9; *Infra* 25-6, 28.)

2. The Court found that "By increasing the flow of the urine they dilute its sugar content, while the actual condition of the patient remains as before." (*Supra* 3.) Dr. Cowles found in his experience that after the first few days there was no increase in the volume of urine, and that there was not any condition that could be termed polyuria. (*Infra* 29.)

3. The Court found that "Uvursin, without diet, was found to be devoid of therapeutic value in the treatment of the malady." (*Supra* 3.) Dr. Cowles found in his experience that there were certain cases of diabetes where diet alone would control, and where it was not necessary to give Uvursin, but that it was his experience that by the administration of Uvursin with the diet better results followed. (*Supra* 10.)

4. The Court found that "in diabetic cases there may be spontaneous or temporary remissions, depending in part on the character of the diet." (*Supra* 4.) Dr. Cowles found in his experience that if Uvursin wasn't the cure, it was one of those strange coincidents that are talked

about, because there was no treatment except Uvursin and the gangrene did disappear. He found that Uvursin adds to the value of diet in the treatment of diabetes. (*Infra* 28.)

In Dr. Cowles' practice, tests were made to see the progress by checking the general feeling of the patient, the blood sugar content, and the sugar in the urine. He did this in all the cases mentioned in his testimony. All of his testimony was based on blood tests as well as urine tests. (*Infra* 29.)

Dr. Cowles had patients on a straight diet without Uvursin, at times they would run out of Uvursin and think they could get along without it, and then they would come back suffering from the symptoms of diabetic increase. (*Infra* 29-30.)

Dr. Cowles did not know which ingredient it was of Uvursin that did the work, it was the combination, he thought. He didn't know what caused the effect, but the effect was there. (*Infra* 30.)

It is, therefore, respectfully submitted:

1. That this is not a case for a death sentence upon assumption;
2. That the door should not be closed to the clinical test desired by the Commission's own witness, and prayed, in the Circuit Court, by petitioner; and
3. That the Order to Cease and Desist, and its affirmance by the Circuit Court, should be reversed, with an order and direction for the clinical test.

4. THE DECISION OF THE CIRCUIT COURT IS IN CONFLICT IN PRINCIPLE WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

FIRST: The decision is in conflict with *Farris v. Interstate Circuit* (Fifth Circuit), 116 Fed. (2d) 409, at pages 411-12, where it is held that a witness was not qualified as an expert on the subject of inquiry. The three Commission witnesses were qualified on the basis of their general knowledge, although none of them had any basis of particular knowledge on Uvursin as a combination of plant materials or on its effect when used with a patient.

Please also see *Westinghouse Electric & Mfg. Co. v. Denver Tramway Co.* (District Court), 3 Fed. (2d) 285, at 294, for a statement of the rule.

SECOND: The decision is in conflict with *Kidder Oil Company v. Federal Trade Commission* (Seventh Circuit), 117 Fed. (2d) 892, at page 894, where it is held that the primary question for decision was whether the findings of fact as made by the Commission are sustained by substantial evidence. There was no substantial evidence against Uvursin. The order is based on the general knowledge of the Commission witnesses who professed no actual knowledge on the subject. (*Supra* 6.)

THIRD: The decision is in conflict with *Capon Water Company v. Federal Trade Commission* (Third Circuit), 107 Fed. (2d) 516, at 517, where it is held that if the water in question did possess separate curative properties, their use and so their advertisement should be encouraged. Uvursin has been used successfully. (*Supra* 14.)

Conclusion.

The Court stated in its opinion that "It goes without saying that the petitioner was itself at liberty to have clinical tests of this character conducted and to present the results to the Commission if it saw fit", meaning the clinical test proposed by Dr. Modern.

Under the rules stated in *Century Metal Craft Corp. v. Federal Trade Commission* (Seventh Circuit), 112 Fed. (2d) 443, at 447, the grant of original jurisdiction to the Circuit Court to enforce, set aside, or modify orders of the Federal Trade Commission carries with it the power in the Circuit Court to thereafter vacate or modify its decree in this Uvursin case whenever good cause is shown to exist as a result of changed conditions.

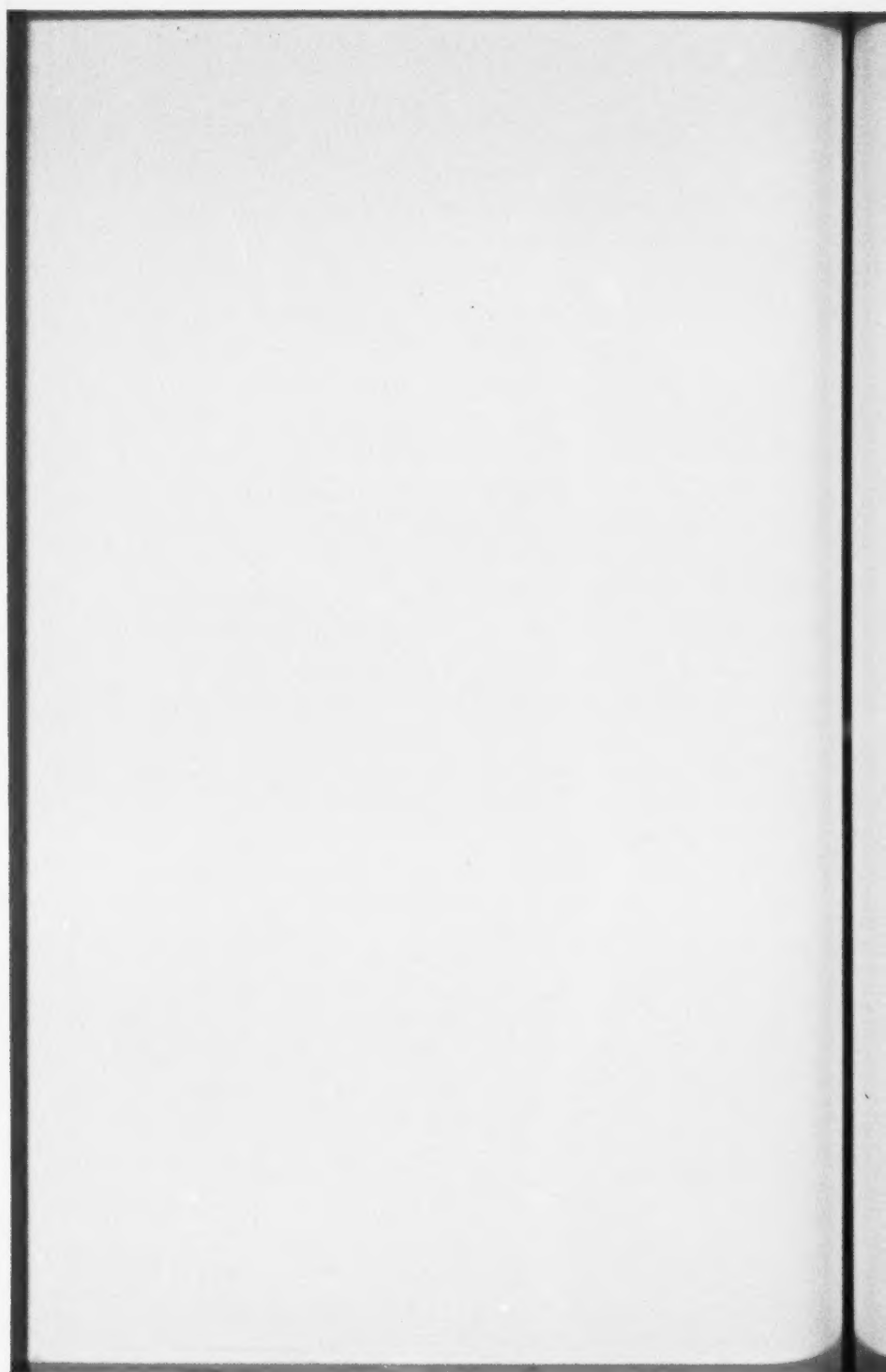
Petitioner asks why the burden should be placed upon it to conduct and present clinical tests, in view of the rejection of the clinical proof furnished by Dr. Cowles, when the Commission's own witness proposed the test to qualify himself with competent knowledge, and when he is so situated in a great hospital as to make the test acceptable to all, and when this is prayed by petitioner without condition except that it be represented by an acceptable physician in the conduct of the test.

Petitioner respectfully urges that as a matter of public policy, under the increasing mortality rate of diabetes, the Insulin monopoly should not be fostered upon incompetent testimony and that the test should be ordered and directed as prayed by petitioner. (*Supra* 17.)

It is respectfully submitted that this petition should be granted.

ZACH LAMAR COBB,
Counsel for Petitioner.

September, 1942.



APPENDIX.

Statement of Dr. Cowles' Testimony Contained in Petitioner's Exceptions to Report of Trial Examiner.

In paragraph 8 of the Assignment of Errors [R. 363], petitioner adopted its Exception 14 to the report of the Trial Examiner, where a more complete statement of testimony of Dr. Cowles was set forth, and in which petitioner requests the Commission to include the fuller facts in its findings [R. 42], as follows:

"He has seen cases of diabetes where insulin failed as a remedy." [R. 44.]

"Some diabetic cases have been high spots in his practice. Others are not any more than the usual country doctor would have. His first bet always is with insulin and after a time he can take them from the insulin and put them on Uvursin, because it is more convenient, satisfactory, and cheaper for them. He can still keep control of them and get a general clinical picture of them where it is necessary. He has had some very striking cases." [R. 45.]

"The first case he mentioned was a man seventy-six years old. He came to the office suffering from progressive arthritis obliterans, known as Berger's disease, a disease that is picked up at the terminal vessels between the arteries and the veins, the capillaries will fill up and the tissue dies causing great pain, because the nerves are crying out for food all the time. This cry and the resulting pain is terrific, and with this man both his legs died. He had to amputate one leg above the knee and he amputated the other up almost to the hip. After that the stumps and sutures wouldn't heal." [R. 45.]

"After giving him insulin for a week or so, this man still had a sugar content, and the witness didn't know how much the sugar had to do with the non-healing of these stumps. The sugar content was about 220 and about 4% or 5% sugar in the urine. Witness gave him insulin. It had no effect upon the sugar at all. Witness couldn't reduce the sugar for 4 or 5 days. It remained practically the same." [R. 45.]

"Then witness looked around for some other means and he heard indirectly of Uvursin, so witness put him on Uvursin and took away all his food and gave him nothing but distilled water. In 5 days the sugar—it was the most remarkable thing witness ever saw in his life—the blood sugar was down to 130. Normal sugar is about 100, 105, 110, one-tenth of 1% of sugar is the normal quantity of sugar in the blood." [R. 45-6.]

"As the sugar decreased the stumps commenced to heal; the sutures commenced to hold. It was only a question of possibly three or four weeks and he was feeling fine and both stumps had healed. That was the most remarkable case witness ever saw." [R. 46.]

"The treatment with Uvursin was in June, 1932. He later died in the Orange County Hospital from another cause, intermediary pneumonia, in 1936." [R. 46.]

"Another case was in 1933. He was a prominent man in Orange County; eighty-one years old. He had chronic diabetes combined with cancer of the pancreas. Witness kept him on a sustaining diet by constant use of Uvursin. Witness never used insulin in his case, but used Uvursin and kept the sugar down with the diet. He was eighty-one years old and lived four

years until 1937. Witness never gave him insulin. He just wouldn't take a hypodermic. Witness was forced to use Uvursin and the diet." [R. 46.]

"Witness had another case of a man, fifty-two years old, in 1934, with chronic diabetes, and gave him Uvursin. He is yet up in Santa Maria and is working in the oil fields as a roustabout. He has to work awfully hard. This man had previously taken insulin, but had had trouble. He broke a needle off in his thigh and got an abscess. Witness told him these capsules have worked fairly well in a number of cases and you can try them, and report to him often and see. And strange to say, he got along better than he had on insulin. He has not taken any insulin since." [R. 47.]

"He came to the office of witness last Thursday and his physical condition was fine. Witness tested his urine and he had about 3% sugar. He confessed that he had been eating a piece of pie every day for lunch. Witness took a blood sugar test and it was 180, so he took some more of these Uvursin capsules along and went back. He said he would be all right if he went on his diet and took the capsules. He is in physical condition to do heavy work." [R. 47.]

"Witness also had a woman patient fifty-two years old. She was in a diabetic coma when they brought her in and witness put her in the hospital and had to use glucose in her veins. He put 80 units of insulin in the first dose and watched her closely. Her blood sugar was 280. He worked along, normal saline intravenous and glucose intravenous with insulin, and got her out of the coma and kept her in the hospital for about a week, and she went out and took her insulin with her and she went over toward Buena Park and took a practical nurse with her to give her

the insulin. This was another case of abscess and broken needle. The practical nurse gave it to her when she was lying down, in the deltoid muscle—that is up in the shoulder—and the muscle is moving all the time. She broke the needle there and witness had to bring her back to the hospital. He hunted for that needle and that was hard to find because the deltoid muscle on the shoulder is always moving and it just played travels.” [R. 48.]

“Well, he found it. Then, she refused to take any more. She wanted some like her brother-in-law had and witness didn’t think it would possibly hold her because she was such a severe case of diabetes. He did give it to her and she took it. Strange to say she is still able to do her housework and is going strong. That was in 1934 and she is still using Uvursin and going strong. She has never used insulin since then. She won’t take it.” [R. 48.]

“Witness certainly considers that Uvursin has a therapeutic value. It has proven efficacious in his hands, in the treatment of diabetes. In the case he cited the sutures commenced to hold and the gangrene on his patient’s stumps stopped in six days, with treatment of Uvursin.” [R. 48.]

“If Uvursin wasn’t the cure, it was one of those strange coincidents that are talked about, because there was no treatment except Uvursin and the gangrene did disappear. Witness thinks that Uvursin adds to the value of the diet in the treatment of diabetes.” [R. 48.]

“In the treatment of the patient, tests are made to see the progress by checking the general feeling of the patient, the blood sugar content, and the sugar in the urine. He did this in all of the cases men-

tioned. All of his testimony was based on blood tests as well as urine tests." [R. 49-50.]

"Polyuria is excretion of a lot of urine in excess amounts. After the first few days there is no increase in the volume of urine from the use of Uvursin, and there isn't any condition that could be termed polyuria. With the Uvursin treatment witness found almost a complete absence of sugar from the urine after about 16 to 18 days. After the first few days there would be less urine passed than before, yet there would be a continued reduction in the sugar content. That has been his experience. The elimination of sugar from the urine was not due to any polyuria." [R. 49-50.]

"Doctors are constantly learning new things about the human body, and the proof comes from what works with the body itself. That's the final analysis of success. In his experience he has found Uvursin to be successful in the actual treatment of human beings. He has taken the diet suggested to use with Uvursin and has gone through it and marked the quantities of each thing that should be taken according to the weight of the patient. He takes their blood sugar and this diet, which is a very good selection of alkaline and anti-diabetic food and he thinks their bran biscuit on the back is just fine, but this diet would not be sufficient without Uvursin." [R. 50-1.]

"Whether diet without Uvursin would afford a diabetic patient relief depends upon the condition of the pancreas. The patient that witness spoke of who worked in the oil field took the diet alone when he ran out of Uvursin, and got a great increase in his sugar and headaches, and eye symptoms until he got some Uvursin. The increase of sugar content was,

of course, influenced both by the pies he ate and his failure to take the Uvursin. Of course, the diet is necessary." [R. 51.]

"He has had patients on a straight diet without the Uvursin when they would run out of Uvursin and think they could get along without it, and then they would come back suffering from the symptoms of diabetic increase, which would recede shortly after he had given them the Uvursin." [R. 51.]

"He does not know which ingredient it is of Uvursin that does the work. It is a combination, he thinks. He doesn't know what causes the effect, but the effect is there." [R. 51.]

MORTALITY SUMMARY FOR U.S. REGISTRATION STATES: I
DIABETES MELLITUS

VITAL STATISTICS—SPECIAL REPORT

Vol. 12, No. 21, Sept. 21
August 4, 1943

A. Trend of crude death rates

Year	Deaths from diabetes mellitus	Rate per 100,000 estimated population
1940 ^a	36,015	25.6
1939.....	35,995	25.5
1938.....	31,087	23.9
1937.....	30,567	23.7
1936.....	30,426	23.7
1935.....	28,364	22.3
1934.....	28,000	22.2
1933.....	26,955	21.4
1932.....	26,146	20.4
1931.....	24,144	20.4
1930.....	22,345	19.1
1929.....	21,631	18.5
1928.....	21,547	19.0
1927.....	18,580	17.4
1926.....	16,604	15.9
1925.....	17,112	15.6
1924.....	16,354	14.8
1923.....	17,135	15.7
1922.....	16,939	15.3
1921.....	14,581	13.7
1920.....	13,998	13.1
1919.....	12,488	12.0
1918.....	12,598	12.1
1917.....	11,867	11.8
1916.....	11,518	11.9
1915.....	10,914	11.8
1914.....	9,985	10.5
1913.....	8,946	10.4
1912.....	8,852	10.1
1911.....	8,121	10.1
1910.....	7,252	10.3
1909.....	6,226	14.1
1908.....	5,319	13.5
1907.....	4,914	14.2
1906.....	4,524	15.4
1905.....	3,906	14.1
1904.....	3,036	14.2
1903.....	2,650	12.7
1902.....	2,421	11.7
1901.....	2,239	11.6
1900.....	2,187	11.0

B. Death rates (per 100,000 enumerated population) by race

Race	1940	1930
All races.....	25.6	19.1
White.....	27.6	19.8
Negro.....	18.0	12.9
Indian.....	13.6	10.3
Chinese.....	42.9	26.7
Japanese.....	12.6	5.0
Other races.....	5.9	2.0

C. Percent of deaths from diabetes mellitus to all causes, by race

Race	1940	1930
All races.....	2.5	1.7
White.....	2.8	1.8
Negro.....	1.5	0.8
Indian.....	1.0	0.7
Chinese.....	2.9	1.6
Japanese.....	1.5	0.5
Other races.....	0.6	0.2

D. Death rates by month: 1940

Month	Annual rate	Month	Annual rate
Jan.....	32.6	July.....	25.5
Feb.....	32.8	Aug.....	21.3
Mar.....	31.5	Sep.....	22.2
Apr.....	26.9	Oct.....	22.7
May.....	28.1	Nov.....	22.3
June.....	25.7	Dec.....	23.1

B. Age-specific death rates per 100,000 estimated population

Age	1940 ^a	1939	1938	1935	1930	1925	1920	1915	1910	1900
All ages.....	25.6	25.5	23.9	23.7	23.1	19.8	18.1	17.5	16.5	11.9
Under 1 year.....	1.5	1.5	1.5	0.9	0.7	1.0	1.4	1.2	1.2	2.5
1-4 years.....	0.8	0.8	0.9	1.1	1.5	1.3	2.3	2.5	2.4	2.0
5-14 years.....	2.4	1.5	1.4	1.5	2.0	2.1	3.5	4.3	3.8	3.3
15-24 years.....	2.4	2.3	2.2	2.5	2.8	2.9	4.9	4.7	4.3	4.3
25-34 years.....	2.8	2.5	2.5	2.7	3.3	3.4	5.6	5.9	5.1	5.0
35-44 years.....	6.7	6.4	6.5	6.3	6.8	7.0	8.2	8.9	8.3	6.8
45-54 years.....	25.0	26.7	24.0	24.3	28.5	23.1	28.1	26.0	25.7	15.5
55-64 years.....	87.2	85.0	79.7	80.5	78.5	68.8	64.8	72.5	68.0	40.8
65-74 years.....	198.3	186.1	179.0	171.4	151.3	130.6	113.7	125.3	104.5	87.0
75 years and over.....	206.0	226.6	242.7	222.5	174.4	156.7	131.6	150.9	106.7	68.8

C. Death rates, by sex and race, per 100,000 estimated population

Sex and race	1940 ^a	1939	1938	1935	1930	1925	1920	1915	1910	1900
Male.....	20.0	19.1	17.8	17.2	15.0	13.8	14.4	15.5	14.0	11.2
Female.....	35.2	32.0	30.1	27.5	30.2	19.8	18.0	19.9	16.6	10.7
White.....	27.6	26.4	24.8	23.5	19.8	17.4	16.9	17.9	15.5	---
Male.....	20.9	19.9	18.1	17.4	15.6	14.3	15.0	16.7	---	---
Female.....	34.3	33.0	31.2	28.7	24.0	20.5	18.6	20.9	---	---
Other races.....	17.9	17.6	15.6	15.6	12.6	10.6	8.0	10.9	---	---
Male.....	11.1	10.5	9.4	8.4	8.4	7.2	8.4	---	---	---
Female.....	23.8	22.4	20.9	17.0	16.1	12.5	8.8	12.5	---	---

B. Age-specific death rates, by sex and race: 1940

Sex and race	All ages	Under 1 year	1-4 years	5-14 years	15-24 years	25-34 years	35-44 years	45-54 years	55-64 years	65-74 years	75 years and over
Total.....	25.6	1.5	0.8	1.4	2.4	2.8	6.7	25.0	87.2	198.3	206.0
Male.....	20.0	1.8	0.9	1.2	2.3	2.7	5.3	18.1	60.5	139.3	229.5
Female.....	35.2	1.2	0.6	1.6	2.4	2.9	8.0	32.4	115.2	258.6	296.3
White.....	27.6	1.4	0.9	1.4	2.3	2.6	5.6	23.4	87.2	196.4	216.2
Male.....	20.9	1.7	0.9	1.2	2.1	2.5	5.0	17.6	61.2	145.8	237.6
Female.....	34.3	1.1	0.8	1.5	2.4	2.8	6.1	29.5	114.3	246.5	310.3
Negro.....	18.0	1.7	0.6	1.0	3.3	4.8	16.8	42.1	86.4	100.7	111.4
Male.....	11.4	1.8	0.5	0.8	3.5	3.9	8.1	22.5	47.0	54.0	108.5
Female.....	24.2	1.7	0.4	1.9	3.0	5.8	24.4	64.6	129.4	139.4	116.5
Other races.....	12.8	8.2	0	0	0	0	7.5	44.6	112.5	108.4	113.8
Male.....	19.2	16.4	0	0	0	0	8.7	32.5	105.1	99.9	145.0
Female.....	15.0	0	0	0	1.8	0	11.1	50.9	135.6	118.6	87.2

E. Contributory causes of death: 1940

Cause	Number	Percent
Total.....	39,008	100.0
Primary cause.....	35,015	89.8
Only cause.....	5,355	13.7
With other causes.....	29,663	76.0
Secondary to other causes.....	5,991	10.2

I. Principal causes secondary to diabetes mellitus, by rank order: 1940

Cause	Number	Percent
Total.....	29,663	100.0
Mis. of heart (all forms) (90-95).....	12,356	41.6
Sepsis (all forms) (130-132).....	4,365	14.4
Intra. lesions of visc. org. (85).....	3,474	11.7
Influenza and pneumonia (all forms) (121-128).....	2,121	7.3
Arteriosclerosis, etc. (97).....	1,816	6.1
All other causes.....	5,622	19.0

J. Principal causes to which diabetes mellitus is secondary, by rank order: 1940

Cause	Number	Percent
Total.....	5,991	100.0
Cancer (all forms) (40-58).....	1,544	25.7
Tuberculosis (all forms) (13-22).....	725	12.0
Accidents (169-185).....	513	15.4
Appendicitis (121).....	232	6.3
Syphilis (all forms) (90).....	136	2.3
All other causes.....	681	20.8

K. Death rates (per 100,000 enumerated population), by place of residence, by race: 1940

Area	Total	White	Other races
United States.....	25.6	27.6	17.9
Cities of -			
100,000 and over.....	33.9	34.7	25.6
10,000 to 100,000.....	30.7	31.1	25.8
2,500 to 10,000.....	29.9	30.5	22.8
Rural.....	19.3	20.5	11.1

L. Percent distribution by institution: 1940

Institution	Number	Percent
Total.....	35,015	100.0
Not in institution.....	18,967	54.2
In general hospital.....	15,472	39.6
In tuberculosis hospital.....	22	0.1
In other nonresidential institutions.....	1,053	3.0
In mental institution.....	388	1.1
In other residential institutions.....	501	1.4

M. Percent distribution in institutions, by type of control: 1940

Type of control	Number	Percent
Total.....	35,015	100.0
No institution.....	18,967	54.2
Government.....	4,861	13.9
Nonprofit.....	9,225	26.3
Proprietary.....	1,356	3.7
Other.....	646	1.9

^a See Introduction (Vital Statistics—Special Reports, vol. 12, No. 1, p. 5) for composition and significance of E. S. Death Registration States.
Based on enumerated population. Based on estimated population.
*Cancer (98), 5.9; hemorrhagic infarction, etc. (111), 1.1; other diseases of the kidneys and ureters, etc. (128), 1.1; sarcoma and carcinoma (141), 1.0; senility (182), 0.5; all other causes.

DIABETES MELLITUS

1. DEATH RATES (NUMBER PER 100,000 INHABITED POPULATION) FOR DIABETES MELLITUS, BY AGE AND RACE BY PLACE OF OCCURRENCE, AND BY URBAN AND RURAL BY PLACE OF RESIDENCE, AND PERCENT OF DEATHS IN HOSPITALS BY PLACE OF OCCURRENCE: RACE GEOGRAPHIC DIVISION AND STATE, 1940

Division and State	Total (all ages)	Place of occurrence									Place of residence		Percent in hos- pitals by place of oc- currence
		Under 1	1-4	5-14	15- 24	25- 44	45- 64	65 and over	White	Negro	Urban	Rural ¹	
United States...	26.6	1.5	0.8	1.4	2.4	4.6	50.2	211.8	27.6	18.0	32.6	21.1	45.8
New England.....	35.6	0	1.1	1.3	1.2	4.5	55.8	254.1	36.6	36.4	36.5	34.1	46.9
Maine.....	32.1	0	0	2.6	2.8	3.5	42.2	227.8	32.1	76.7	37.7	29.2	36.8
New Hampshire.....	37.0	0	0	1.3	0	4.4	62.5	221.7	37.1	0	32.8	40.3	45.8
Vermont.....	33.7	0	0	1.6	0	3.1	59.4	211.6	33.7	0	28.7	35.2	45.5
Massachusetts.....	35.7	0	1.3	1.4	1.2	4.7	53.8	233.9	35.8	32.5	35.7	37.2	47.7
Rhode Island.....	36.8	0	2.7	0.9	0	3.7	70.1	292.9	36.5	83.5	36.5	47.5	36.6
Connecticut.....	35.8	0	1.1	0.4	1.6	4.8	58.9	279.5	35.9	33.3	39.1	30.1	53.9
Middle Atlantic.....	38.4	1.5	0.8	1.1	1.8	4.5	73.7	301.2	36.7	33.2	40.1	35.3	49.4
New York.....	40.6	0.6	0.6	1.0	1.5	4.2	76.0	319.4	41.2	27.7	41.5	37.2	54.1
New Jersey.....	36.4	0	0.5	0.6	1.2	4.2	66.2	300.2	36.2	40.1	36.8	36.3	47.6
Pennsylvania.....	36.3	3.0	1.2	1.4	2.5	5.2	73.6	276.9	36.3	36.6	39.0	33.7	43.1
East North Central...	30.5	2.3	1.0	1.5	2.3	4.8	54.4	225.2	30.4	31.5	32.6	28.0	45.4
Ohio.....	31.3	1.0	1.0	1.5	1.6	5.2	57.3	214.9	31.2	33.3	33.0	29.1	41.5
Indiana.....	28.1	3.8	0.9	1.1	2.5	4.4	47.8	190.3	27.9	33.6	29.7	28.7	37.2
Illinois.....	34.1	2.9	1.4	1.1	2.6	5.3	60.7	254.1	34.1	34.1	37.5	29.1	49.8
Michigan.....	26.7	1.2	0.6	2.0	2.7	4.0	50.2	229.1	26.8	20.6	25.7	27.7	46.9
Wisconsin.....	28.4	4.1	1.0	2.1	2.2	4.8	45.2	216.8	28.4	65.8	31.7	28.0	47.6
West North Central...	28.5	1.9	1.4	1.9	2.7	4.0	37.7	201.8	28.6	25.4	28.8	25.4	42.1
Minnesota.....	26.8	4.4	3.3	0.9	2.4	4.0	34.9	229.5	26.8	20.1	28.1	26.4	49.2
Iowa.....	28.4	0	1.2	2.4	2.0	4.1	36.0	212.5	28.5	58.9	29.7	27.6	38.5
Missouri.....	25.3	0	0.9	1.3	3.1	4.4	41.7	166.4	25.5	22.9	23.8	21.8	44.3
North Dakota.....	26.6	8.3	0	3.1	2.4	3.5	42.9	269.1	26.6	0	31.8	25.5	43.6
South Dakota.....	23.2	0	0	1.7	2.5	4.0	31.4	216.3	23.3	0	26.0	23.2	43.6
Nebraska.....	28.1	0	1.2	3.1	3.4	3.2	35.9	230.0	28.2	14.1	29.4	27.6	32.7
Kansas.....	28.0	3.8	0.9	2.3	2.5	3.3	39.3	181.4	25.9	30.7	25.5	26.4	36.6
South Atlantic.....	18.2	0.6	0.6	1.2	2.6	5.5	44.3	157.0	19.5	14.3	26.7	13.9	40.8
Delaware.....	30.0	0	6.4	2.4	2.1	2.4	54.4	218.8	29.5	33.4	41.8	20.8	40.0
Maryland.....	31.2	0	0	0.7	2.1	5.8	56.4	256.6	33.5	19.2	36.5	25.2	44.0
Dist. of Columbia...	33.5	0	0	1.3	6.1	8.7	58.3	271.8	35.2	29.4	30.8	...	60.8
Virginia.....	20.1	0	1.0	0.6	2.1	5.5	51.5	160.1	19.9	20.7	26.1	17.8	36.0
West Virginia.....	17.4	0	0	1.3	2.6	4.0	42.7	184.4	17.0	22.1	31.5	13.7	33.2
North Carolina.....	14.2	1.4	1.0	1.7	3.0	4.9	40.9	135.4	14.8	12.6	19.8	12.9	41.5
South Carolina.....	12.6	0	0.6	0.7	2.4	4.6	42.8	111.9	14.4	10.2	25.1	10.8	31.8
Georgia.....	12.2	1.7	0.4	1.2	3.0	5.3	30.4	96.3	13.8	9.0	17.7	10.2	36.8
Florida.....	19.6	0	0	2.5	1.5	7.5	40.1	132.6	21.2	15.4	24.1	15.3	46.8
East South Central...	13.9	1.4	1.0	1.3	3.0	5.5	30.3	115.9	13.9	14.0	21.1	11.8	32.9
Kentucky.....	15.7	0	0	1.4	3.1	6.0	30.7	121.0	15.2	22.0	24.3	13.6	26.1
Tennessee.....	14.2	0	1.3	1.6	2.1	4.7	30.7	119.2	13.0	20.0	21.4	11.1	39.0
Alabama.....	12.2	1.8	2.1	1.5	2.5	5.6	29.4	107.9	12.4	11.7	18.4	10.1	34.6
Mississippi.....	13.4	4.7	0.5	0.6	4.4	6.1	30.5	113.5	14.9	11.7	19.0	12.4	29.5
West South Central...	14.4	1.3	0.5	1.3	2.5	4.6	33.3	119.9	14.6	13.4	20.7	11.8	36.1
Arkansas.....	10.5	2.7	0	1.0	2.7	4.7	25.9	71.6	11.1	6.5	19.3	6.9	29.9
Louisiana.....	17.5	0	0.5	0.6	1.8	6.8	46.8	150.4	19.2	14.4	26.6	13.1	49.2
Oklahoma.....	14.4	0	1.1	1.3	2.3	2.8	27.3	131.1	14.3	14.8	19.0	13.1	34.1
Texas.....	14.4	1.8	0.4	1.7	3.0	4.5	33.0	119.7	14.3	14.8	19.3	11.9	36.3
Mountain.....	16.1	1.2	0.9	1.0	3.3	2.5	28.2	153.7	16.4	24.7	21.4	13.6	53.0
Montana.....	19.3	10.0	0	1.1	1.0	2.5	34.8	162.7	19.8	0	26.0	17.4	59.5
Idaho.....	17.5	0	0	4.1	4.0	0	32.9	234.0	17.7	0	22.1	15.7	49.6
Wyoming.....	16.4	0	0	0	4.2	5.3	20.7	199.1	15.8	0	14.6	16.0	34.1
Colorado.....	17.8	0	0	1.0	4.1	3.1	25.5	141.1	17.9	16.4	21.7	14.9	59.5
New Mexico.....	9.3	0	2.0	0	3.0	0.7	14.3	120.3	8.7	21.4	6.9	7.7	43.2
Arizona.....	11.0	0	0	0	2.2	2.0	29.0	106.7	11.0	26.7	19.6	6.6	52.7
Utah.....	19.4	0	2.1	0.9	3.7	3.4	34.6	215.1	19.7	0	25.0	15.6	44.9
Nevada.....	20.9	0	13.8	0	5.6	6.3	37.0	132.4	20.2	301.2	23.5	16.9	73.9
Pacific.....	25.1	2.3	0.4	1.8	2.5	3.3	36.7	186.0	25.3	21.6	26.4	20.4	54.6
Washington.....	28.1	0	0	1.5	3.7	4.8	34.8	189.5	23.1	20.8	32.7	20.6	53.4
Oregon.....	25.9	6.4	0	5.8	4.9	2.1	32.6	186.6	25.9	39.0	34.3	20.7	53.5
California.....	24.7	2.2	0.6	1.2	2.0	3.1	36.4	183.9	25.9	17.7	27.0	20.3	55.1

¹ "Rural" includes areas having less than 10,000 population.

3. NUMBER OF DEATHS FROM DIABETES MELLITUS, BY AGE AND RACE BY PLACE OF OCCURRENCE, AND BY URBAN AND RURAL BY PLACE OF RESIDENCE, AND NUMBER OF DEATHS IN HOSPITALS BY PLACE OF OCCURRENCE.
RACE GEOGRAPHIC DIVISIONS AND STATE, 1940

Division and State	Place of occurrence										Place of residence		Number in hospitals by place of occurrence
	Total (all ages)	Under 1	1-4	5-14	15-24	25-44	45-64	65 and over	White	Negro	Urban	Rural	
United States..	35,015	30	72	310	583	1,818	12,104	19,101	32,606	2,310	20,423	14,592	15,048
New England.....	3,006	-	5	17	18	111	1,054	1,818	2,969	37	2,156	880	1,411
Maine.....	272	-	-	4	4	8	78	185	271	-	96	173	100
New Hampshire.....	182	-	-	1	-	8	67	102	182	-	78	102	85
Vermont.....	121	-	-	1	-	3	44	73	121	-	16	107	55
Massachusetts.....	1,542	-	3	9	9	61	580	957	1,524	18	1,273	276	736
Rhode Island.....	277	-	1	1	-	8	108	159	270	7	240	41	107
Connecticut.....	612	-	1	1	5	25	222	358	601	11	435	179	350
Middle Atlantic.....	10,560	8	12	48	69	397	4,370	5,699	10,150	421	7,474	3,135	5,228
New York.....	5,471	1	4	19	34	189	2,278	2,945	5,304	158	4,372	1,096	2,959
New Jersey.....	1,513	-	1	5	9	56	605	837	1,422	91	1,037	467	720
Pennsylvania.....	3,596	4	7	24	45	152	1,487	1,876	3,424	172	2,065	1,562	1,549
East North Central..	8,116	9	16	64	107	393	3,089	4,434	7,768	337	4,895	3,246	3,682
Ohio.....	2,185	1	4	16	19	106	857	1,180	2,051	113	1,304	861	898
Indiana.....	964	2	6	15	44	245	548	923	1,411	41	1,096	497	359
Illinois.....	2,693	3	6	15	36	133	1,057	1,443	2,558	132	1,895	827	1,341
Michigan.....	1,402	1	2	18	25	64	534	706	1,353	43	784	612	856
Wisconsin.....	692	2	2	11	12	44	296	325	583	8	446	449	426
West North Central..	3,567	4	12	42	63	153	1,066	2,245	3,494	69	1,341	2,249	1,509
Minnesota.....	747	2	6	4	12	32	202	428	741	2	303	433	350
Iowa.....	959	-	2	10	9	29	188	494	713	9	229	498	278
Missouri.....	171	-	2	8	20	50	337	542	905	56	497	456	425
North Dakota.....	149	1	-	4	3	6	50	106	168	-	27	142	78
South Dakota.....	370	-	1	2	7	8	40	97	144	-	27	125	65
Nebraska.....	489	1	1	7	-	17	150	285	449	20	141	330	182
Kansas.....	5,237	2	8	44	93	285	1,221	1,521	2,559	674	1,494	1,698	1,321
South Atlantic.....	80	-	1	1	1	2	30	45	86	12	47	32	32
Delaware.....	568	-	2	7	22	80	112	167	55	204	...	135	250
Maryland.....	222	-	1	7	11	42	232	248	402	137	201	340	194
Dist. of Columbia..	331	-	2	3	11	21	129	166	304	25	120	209	110
Virginia.....	506	1	3	13	25	49	205	212	379	156	159	364	210
West Virginia.....	239	-	1	3	10	23	111	91	156	83	73	170	76
North Carolina.....	360	1	1	8	19	46	145	156	281	96	143	236	140
South Carolina.....	372	-	-	6	3	45	140	174	293	79	198	143	174
Georgia.....	1,500	3	9	29	62	167	519	710	1,109	390	500	991	494
Florida.....	448	-	-	6	17	46	148	229	401	47	153	302	126
East South Central..	415	-	3	9	12	40	148	203	313	102	176	232	162
Kentucky.....	345	1	3	9	14	44	125	147	230	115	119	221	120
Tennessee.....	292	2	1	3	19	37	98	131	165	126	52	236	86
Alabama.....	1,876	3	5	34	64	180	724	662	1,536	324	793	1,089	714
Mississippi.....	204	1	-	4	10	25	94	77	163	40	46	152	61
West South Central..	413	-	1	3	8	47	175	179	290	122	204	210	203
Arkansas.....	337	-	2	6	10	19	109	190	301	25	122	222	115
Louisiana.....	922	2	2	21	36	69	356	416	764	137	421	505	335
Texas.....	670	1	3	8	25	30	217	396	654	9	220	404	355
Mountain.....	108	1	-	1	1	4	42	56	107	-	35	74	64
Montana.....	92	-	-	4	4	4	32	52	92	-	23	66	45
Idaho.....	200	-	-	2	4	10	25	99	122	2	104	96	119
Wyoming.....	44	-	1	-	3	1	11	26	43	1	8	34	19
Colorado.....	55	-	-	-	2	3	24	26	47	-	56	51	48
New Mexico.....	107	-	1	1	4	4	31	65	107	-	56	51	48
Arizona.....	23	-	1	1	1	3	9	9	21	2	5	15	17
Utah.....	2,443	3	2	24	42	102	804	1,466	2,375	29	1,568	860	1,334
Nevada.....	453	-	-	4	11	25	141	272	444	6	263	192	242
Pacific.....	282	1	-	9	9	7	83	173	279	1	139	142	151
Washington.....	1,708	2	2	11	22	70	560	1,021	1,652	22	1,166	628	941
Oregon.....													
California.....													

*"Rural" includes areas having less than 10,000 population.

DIABETES MELLITUS—U.S. REGISTRATION STATES¹

B. NUMBER OF DEATHS, BY AGE

Age	1940	1939	1938	1935	1930	1925	1920	1915	1910	1900
All ages.....	35,015	33,395	31,037	28,354	22,345	17,112	13,698	10,914	7,252	2,187
Under 1 year.....	30	27	30	18	14	21	28	16	12	10
1-4 years.....	72	69	72	95	129	113	160	113	94	33
5-14 years.....	310	334	332	354	463	437	606	509	329	124
15-24 years.....	563	540	515	580	599	526	717	533	417	157
25-34 years.....	598	557	535	537	629	559	798	625	424	178
35-44 years.....	1,220	1,164	1,144	1,128	1,121	971	976	761	547	186
45-54 years.....	3,885	3,918	3,593	3,453	2,933	2,392	2,030	1,652	1,131	309
55-64 years.....	9,219	8,799	8,050	7,621	6,242	4,524	3,639	2,832	1,861	504
65-74 years.....	12,059	11,464	10,777	9,568	8,361	4,933	3,330	2,677	1,701	472
75 years and over.....	7,032	6,499	5,973	4,968	3,239	2,330	1,623	1,192	731	210

C. NUMBER OF DEATHS, BY SEX AND RACE

Sex and race	1940	1939	1938	1935	1930	1925	1920	1915	1910	1900
Male.....	13,220	12,568	11,606	11,010	8,904	7,159	6,301	4,906	3,430	1,124
Female.....	21,795	20,837	19,431	17,354	13,441	9,953	7,397	6,008	3,822	1,063
White.....	32,606	31,043	28,965	26,506	20,856	16,156	13,325	10,627	7,161	---
Male.....	12,438	11,794	10,936	10,362	8,359	6,767	5,041	4,777	---	---
Female.....	20,168	19,249	18,029	16,144	12,497	9,391	7,284	5,850	---	---
Other races.....	2,409	2,352	2,072	1,758	1,487	954	576	287	91	---
Male.....	732	764	670	648	545	392	250	129	---	---
Female.....	1,627	1,588	1,402	1,110	942	562	313	158	---	---

D. NUMBER OF DEATHS, BY AGE, SEX, AND RACE: 1940

Sex and race	All ages	Under 1 year	1-4 years	5-14 years	15-24 years	25-34 years	35-44 years	45-54 years	55-64 years	65-74 years	75 years and over
Total.....	35,015	30	72	310	563	598	1,220	3,885	9,219	12,059	7,032
Male.....	13,220	18	39	138	270	288	488	1,441	3,271	4,413	2,844
Female.....	21,795	12	33	172	293	310	732	2,444	5,948	7,656	4,188
White.....	32,606	25	66	258	480	495	915	3,324	8,580	11,568	6,860
Male.....	12,438	15	33	121	227	240	415	1,281	3,075	4,251	2,761
Female.....	20,168	10	31	147	255	245	500	2,043	5,505	7,337	4,099
Negro.....	2,310	4	6	42	82	103	299	536	599	463	174
Male.....	716	2	4	17	43	39	70	141	170	151	77
Female.....	1,594	2	2	25	39	64	228	395	429	312	97
Other races.....	99	1	-	-	1	-	3	19	26	11	6
Male.....	66	1	-	-	-	-	3	6	14	7	2
Female.....	33	-	-	-	1	-	-	-	-	-	-

E. NUMBER OF DEATHS, BY RACE

Race	1940	1930
All races.....	35,015	22,345
White.....	32,606	20,856
Negro.....	2,310	1,486
Indian.....	46	35
Japanese.....	34	20
Chinese.....	16	5
Other races.....	3	1

G. NUMBER OF DEATHS, BY MONTH: 1940

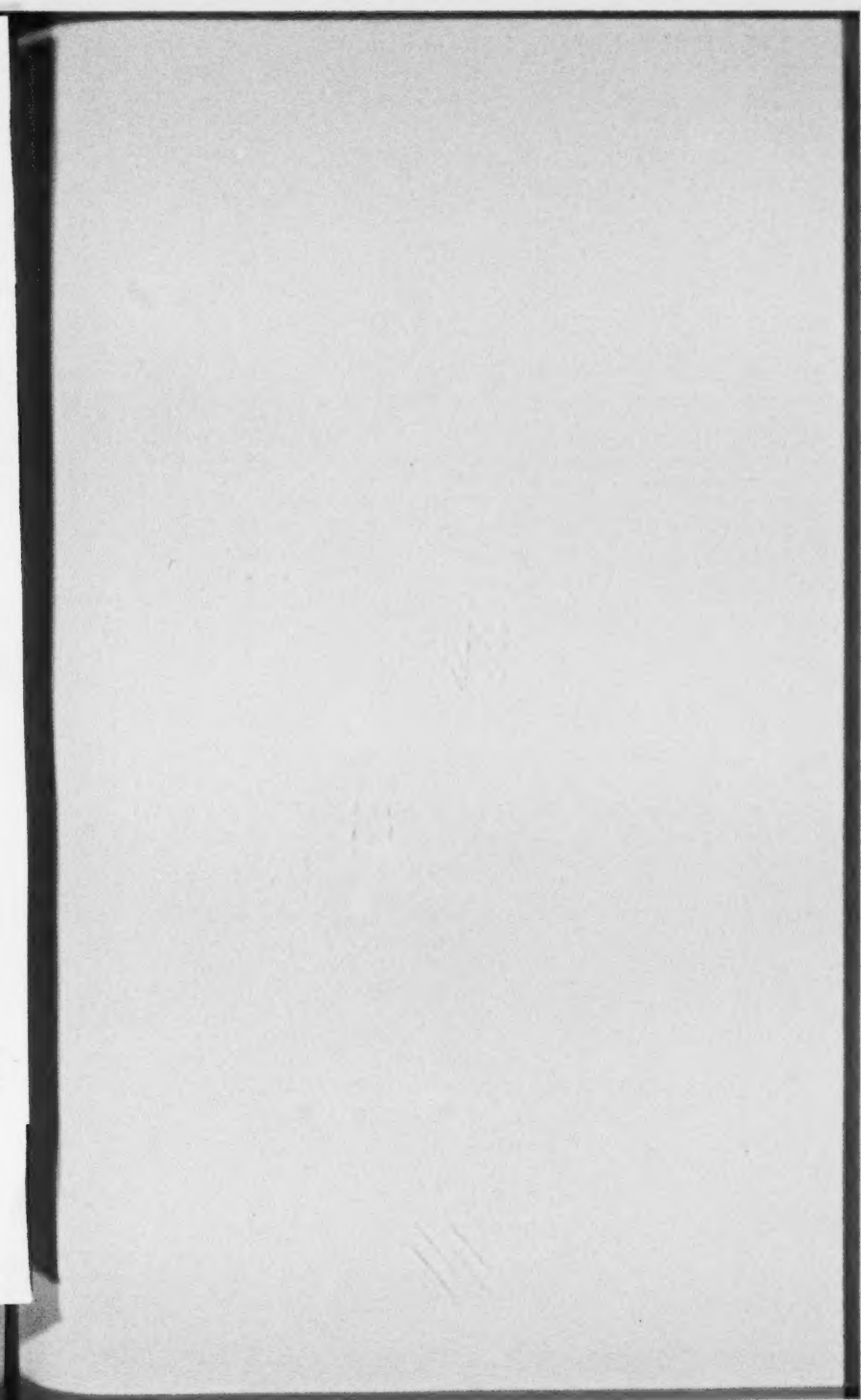
Month	Number of deaths	Month	Number of deaths
January.....	3,651	July.....	2,841
February.....	3,418	August.....	2,377
March.....	3,468	September.....	2,394
April.....	2,901	October.....	2,645
May.....	2,795	November.....	2,635
June.....	2,509	December.....	3,131

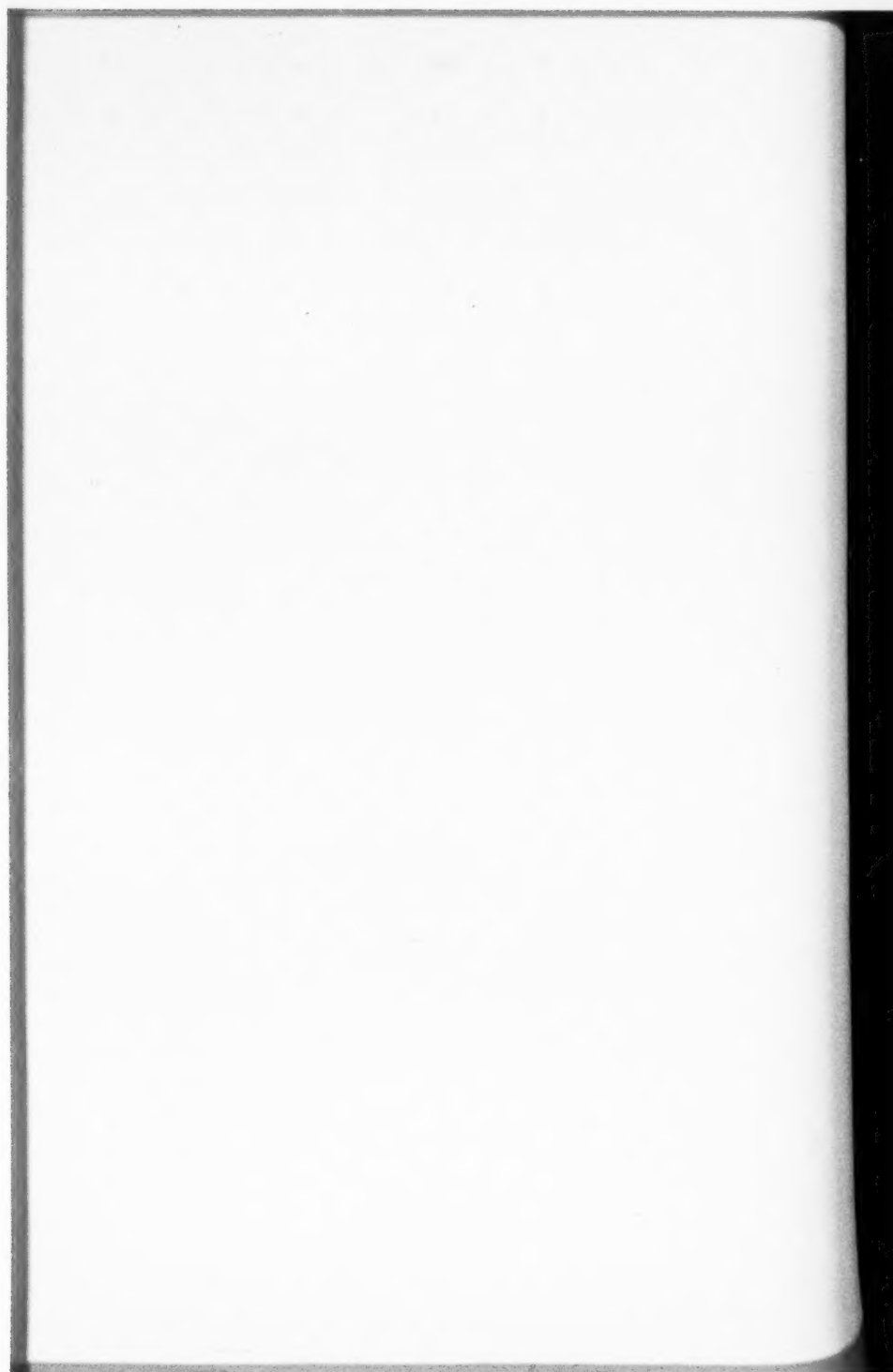
K. NUMBER OF DEATHS BY PLACE OF RESIDENCE, BY RACE: 1940

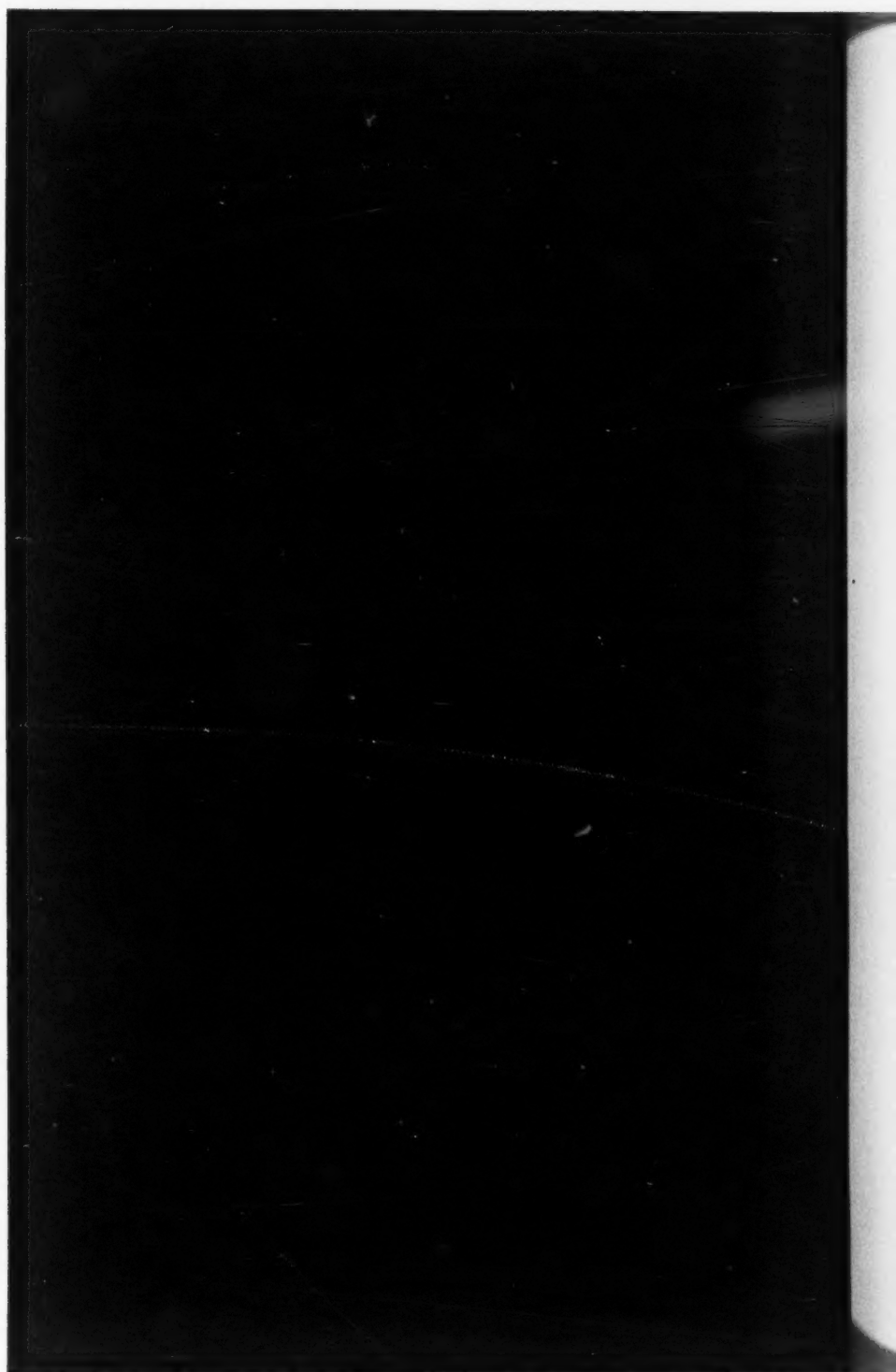
Area	Total	White	Negro	Other races
United States.....	35,015	32,606	2,310	99
Cities of -				
100,000 and over.....	12,865	11,934	902	29
10,000 to 100,000.....	7,598	7,097	490	11
2,500 to 10,000.....	3,499	3,299	187	13
Rural.....	11,053	10,276	751	46

¹See Introduction (Vital Statistics—Special Reports, vol. 16, No. 1, p.3) for composition and significance of U.S. Death Registration States.

Symbols: Not applicable ...; data not available ---; quantity zero, in number tables -; quantity zero, in rate and percent tables 0; less than one-tenth of 1 percent 0.0.







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Statute:

Federal Trade Commission Act as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C., Sec. 45:	
Section 5 (a)	2
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Mundo, <i>The Expert Witness</i> (1938), pp. 38-39	7
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QUESTIONS PRESENTED

(1) Whether the opinion testimony of expert witnesses, who have knowledge of the curative qualities of the drugs contained in petitioner's preparation but who have not observed the effect of actual administration of the preparation to patients, is admissible on the question of the preparation's therapeutic effect in a proceeding before the Federal Trade Commission.

(2) Whether the Federal Trade Commission refused to permit a controlled medical test of petitioner's preparation and whether the court below was required, or even authorized, to order that such a test be made.

STATUTE INVOLVED

The Federal Trade Commission Act as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C., sec. 45, provides:

5 (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioner seeks review of the decree of the court below affirming an order of the Federal Trade Commission, issued in a proceeding under Section 5 of the Federal Trade Commission Act, directing petitioner to cease from disseminating in interstate commerce any advertisement repre-

senting that its preparation "Uvursin" is an effective treatment for diabetes or has any therapeutic value in treating that disease.¹ The court held that the Commission's order was based upon adequate findings and that the only finding attacked by petitioner—that its preparation had no therapeutic value in treating diabetes—was supported by the testimony of expert witnesses which the Commission "was clearly entitled to accept". (R. 381-383.) The court also held that other alleged errors urged by petitioner were without merit (R. 383-384).

The Commission, upon the basis of the undisputed testimony of experts, made the following findings concerning the nature of diabetes, its symptoms and treatment:

Diabetes is a disturbance of carbohydrate metabolism in which the sugar content of the blood is elevated to abnormally high levels due to improper functioning of the pancreas gland (R. 59). This gland secretes insulin into the blood stream for the absorption of carbohydrates (R. 62). Where the pancreas fails to secrete a sufficient amount of insulin, the condition known as diabetes results (*ibid.*) There may be from time to time spontaneous, temporary remissions in the dis-

¹ The Commission's order and the complaint on which it was based were issued after Section 5 had been amended by the Act of March 21, 1938, so as to prohibit, in addition to unfair methods of competition in interstate commerce, "unfair or deceptive acts or practices" in such commerce.

ease, depending partly upon the character of the diet (R. 61).

Diabetes is diagnosed by testing the blood sugar level, and also by the appearance of sugar in the urine, but the existence of diabetes or improvement in diabetic cases can be determined only by blood sugar examination and cannot be determined by examination of the urine alone (R. 59, 61).

The accepted medical treatment of diabetes consists of administering a diet calculated to reduce the sugar intake and, if this fails to reduce the blood sugar level to normal, administration of insulin² by hypodermic injection (R. 59, 62). Where diet proves ineffective, failure to give insulin increases the severity of the disease and may result in diabetic coma and death (R. 63).

Concerning the nature and therapeutic value of petitioner's preparation, Uvursin, and the medical testimony presented by petitioner, the Commission found, among other things:

Uvursin is composed of plant materials which have enjoyed a long reputation, particularly in folklore medicine, for the treatment of urinary conditions (R. 60).³ Their action promotes an

² Insulin is an extract of the pancreatic gland of animals, discovered in 1922 (R. 63). Judicial notice has been taken of the value and importance of insulin in the treatment of diabetes. *United States v. Elmore*, 68 F. (2d) 551, 553 (C. C. A. 5).

³ Petitioner does not supply any quantitative formula of the ingredients of its preparation and it admitted in its advertising that the ingredients listed "will mean practically nothing, even to the experienced therapist" (R. 60).

increased flow of urine and this increased flow reduces the percentage of sugar in the urine but does not affect the blood sugar level (R. 60-61). Petitioner's product has no effect on the essential diabetic disturbance (R. 61). Since it does not in any way deal with the causes of the disease, it is not an efficacious treatment for diabetes (R. 62). Use of Uvursin may be definitely harmful to a patient suffering from diabetes in that it may "give a false sense of security and delay the inauguration of effective treatment" (*ibid.*).

Petitioner's medical witnesses were four practicing physicians who had used Uvursin in individual cases. Three of them had used only the urinalysis test to determine sugar. The fourth did use the blood test, but testified that he usually began his treatment with insulin and turned to petitioner's product in those cases where the patient refused to permit injection of insulin by hypodermic needle. All four physicians had employed petitioner's product in connection with the diet which it recommended.⁴ The witnesses admitted that where serious recurrence of sugar in the urine appeared after discontinuance of petitioner's product, discontinuance or failure to follow the diet prescribed had also occurred (R. 63).

⁴ This diet conforms closely to the type of diet that physicians recommend in diabetic cases (R. 62).

The Commission gave petitioner's medical testimony "full consideration," but concluded that in view of the spontaneous remissions characteristic of diabetes and the possible effect upon its symptoms produced by diet control, "the testimony in the record based upon experience in individual cases is of little probative value, as compared to the expert testimony in the record based upon general knowledge" (R. 63-64).

ARGUMENT

1. If the testimony of the Commission's expert witnesses was admissible, its finding that Uvursin is without therapeutic value in treating diabetes obviously is "supported by evidence" and therefore is, by the terms of the statute,⁵ conclusive. Petitioner seems to contend (Pet. 20) that the fact that these witnesses were without knowledge or experience in administering Uvursin to patients made their testimony inadmissible. Not only has petitioner failed to cite any decision supporting its contention, but the authorities are uniform that medical experts are competent to give opinion testimony concerning the therapeutic value of drugs, alone or in combination, notwithstanding lack of actual experience in administering the particular drug or combination of drugs

⁵ Federal Trade Commission Act as amended, Sec. 5 (c).

involved in the proceeding.⁶ As the court pointed out in the *Goodwin* case (cited in note 6), expert knowledge of the curative qualities, or lack thereof, of the drug ingredients of a product makes opinion testimony as to its therapeutic value competent regardless of actual experience in use of the drugs in the exact form in which they are combined in the product in question.

Petitioner contends (Pet. 23) that the decision below is in conflict "in principle" with decisions of other circuit courts of appeals. We submit that the three decisions cited by petitioner wholly fail to sustain this contention.

Farris v. Interstate Circuit, Inc., 116 F. (2d) 409, 411-412 (C. C. A. 5), held that it is error to allow a witness who is not qualified as an expert to give opinion evidence on a question which the jury, on the other evidence before it, is fully competent to determine. Not only is the holding clearly remote from the evidentiary question raised here, but that case involved the admissibility of evidence in the trial of an action before a jury,

⁶ *Justin Haynes & Co. v. Federal Trade Commission*, 105 F. (2d) 988, 989 (C. C. A. 2), certiorari denied, 308 U. S. 616; *Neff v. Federal Trade Commission*, 117 F. (2d) 495, 496-497 (C. C. A. 4); *Dr. W. B. Caldwell, Inc. v. Federal Trade Commission*, 111 F. (2d) 889, 891 (C. C. A. 7); *Goodwin v. United States*, 2 F. (2d) 200, 201 (C. C. A. 6).

See also *Kershaw v. Tilbury*, 214 Calif. 679, 691-692; *Boswell v. State*, 114 Ga. 40, 42-43; Rogers, *Expert Testimony* (3d ed. 1941), p. 72; Mundo, *The Expert Witness* (1938), pp. 38-39.

rather than in an administrative proceeding. *Kidder Oil Co. v. Federal Trade Commission*, 117 F. (2d) 892, 894 (C. C. A. 7), seems to be cited for the elementary proposition that a reviewing court will disregard any finding of the Commission which is not supported by any substantial evidence. The court there modified a Commission order because it found certain portions of the order not supported by substantial evidence. The case has no bearing on the question here raised. In *Capon Water Co. v. Federal Trade Commission*, 107 F. (2d) 516 (C. C. A. 3), the court not only affirmed the Commission's order but expressed the opinion that the order erred on the side of leniency. Petitioner, however, appears to draw some comfort from the dictum (p. 517) that if mineral waters "do possess separate curative properties, their use and so their advertising should be encouraged."

2. Petitioner contends (Pet. 15-19) that the Commission did not "permit" one of the Commission's medical witnesses to make a controlled test of Uvursin and that this was "against public policy." But, as the court below stated (R. 384), the record does not support this charge. What the record shows is that one of the Commission's medical experts volunteered the information while he was on the stand that at one time he had contemplated making a controlled test of Uvursin; that he had abandoned this plan after learning

that some patented remedies for diabetes contain a drug, very difficult to detect, which is a liver poison; and that he thereupon advised the Commission that he was unwilling to expose his patients "to that potential danger", i. e., liver poisoning (R. 109-114).⁷

Petitioner, relying upon the fact that in its reply brief filed in the court below it stated that it "consents" to a controlled medical test of Uvursin and "respectfully submitted" that a test "should be made now," contends that the court should have ordered such a test. This contention is without merit. The statute provides a remedy for adducing additional evidence.⁸ Petitioner has neither availed itself of that remedy nor shown

⁷ Even if the record had shown that the Commission had blocked the making of a test by its own witness, this would not have been error. Such action would not have barred petitioner from making its own test and presenting the results thereof in evidence. (See opinion below, R. 384.)

⁸ Section 5 (c) of the Act provides that the reviewing court shall affirm, modify, or set aside the Commission's order upon the basis of "a transcript of the entire record in the proceeding" before the Commission. The section further provides:

"* * * If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper."

that the prerequisites for obtaining it—the materiality of the evidence, and reasonable grounds for failing to adduce the evidence before the Commission—exist. Under these circumstances the court was not authorized, much less required, to order the taking of further evidence.

Petitioner also apparently contends that the Commission's order will put it out of business and thereby give to the manufacturers of medically used insulin a monopoly on the cure for diabetes. Even if this contention were relevant, it was not urged before the Commission, and no evidence was introduced to support the allegation of monopoly. The court below correctly decided that there was no merit in this contention.

CONCLUSION

The decision below was correct, and there is no conflict with decisions in other circuits. It is therefore respectfully submitted that the petition for writ of certiorari be denied.

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